

Jun 28, 2019

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

ESPERANZA C,¹

Plaintiff,

v.

COMMISSIONER OF SOCIAL
SECURITY,

Defendant.

No. 4:18-CV-05132-EFS

**ORDER GRANTING PLAINTIFF'S
SUMMARY JUDGMENT MOTION
AND DENYING DEFENDANT'S
SUMMARY JUDGMENT MOTION**

Before the Court, without oral argument, are cross summary-judgment motions.² Plaintiff Esperanza C. appeals the Administrative Law Judge's (ALJ) denial of benefits.³ Plaintiff argues that the Appeals Council erred by failing to properly consider additional evidence submitted to it. Plaintiff also contends the ALJ: (1) failed to properly analyze Plaintiff's residual functional capacity; (2) improperly evaluated the medical opinion evidence; (3) failed to properly evaluate the physical conditions affecting Plaintiff by failing to look at the record in a "longitudinal" fashion; (4) failed to consider the physical demands of Plaintiff's past

¹ To protect the privacy of social-security plaintiffs, the Court refers to them by first name and last initial. *See* LCivR 5.2(c). When quoting the Administrative Record in this order, the Court will substitute "Plaintiff" for any other identifier that was used.

² ECF Nos. 11 & 16.

³ *See generally* ECF No. 11.

1 work; (5) failed to meet her step five burden; and (6) failed to consider Plaintiff's
2 subjective complaints. The Court has reviewed the administrative record and the
3 parties' briefing. For the reasons set forth below, the Court grants Plaintiff's Motion
4 for Summary Judgment and denies Defendant's Motion for Summary Judgment.

5 **I. Standard of Review**

6 On review, the Court must uphold the ALJ's determination that Plaintiff is
7 not disabled if the ALJ applied the proper legal standards and there is substantial
8 evidence in the record as a whole to support the decision.⁴ Substantial evidence
9 means more than a mere scintilla, but less than a preponderance.⁵ It means such
10 relevant evidence as a reasonable mind might accept as adequate to support a
11 conclusion.⁶ The Court will also uphold the ALJ's reasonable inferences and
12 conclusions drawn from the record.⁷

13 In reviewing a denial of benefits, the Court considers the record as a whole,
14 not just the evidence supporting the ALJ's decision.⁸ That said, the Court may not
15 substitute its judgment for that of the Commissioner.⁹ If the evidence supports more
16 than one rational interpretation, a reviewing court must uphold the ALJ's decision.¹⁰
17 Further, the Court "may not reverse an ALJ's decision on account of an error that is
18 harmless."¹¹ An error is harmless "where it is inconsequential to the [ALJ's] ultimate
19
20
21

22 ⁴ *Molina v. Astrue*, 674 F.3d 1104, 1110 (9th Cir. 2012) (citing *Stone v. Heckler*, 761 F.2d 530, 531
23 (9th Cir.1985)).

24 ⁵ *Id.* at 1110–11 (citation omitted).

25 ⁶ *Id.* (quoting *Valentine v. Comm'r Soc. Sec. Admin.*, 574 F.3d 685, 690 (9th Cir.2009)).

26 ⁷ *Id.* (citing *Tommasetti v. Astrue*, 533 F.3d 1035, 1038 (9th Cir.2008)).

27 ⁸ *Id.*; See *Weetman v. Sullivan*, 877 F.2d 20, 22 (9th Cir. 1989).

⁹ *Garrison v. Colvin*, 759 F.3d 995, 1010 (9th Cir. 2014).

¹⁰ *Id.*

¹¹ *Molina*, 674 F.3d at 1111 (citing *Stout v. Comm'r, Soc. Sec. Admin.*, 454 F.3d 1050, 1055–56 (9th
Cir. 2006)).

1 nondisability determination.”¹² The burden of showing that an error is harmful
2 normally falls upon the party attacking the agency’s determination.¹³

3 **II. Five-Step Disability Determination**

4 The ALJ uses a five-step sequential evaluation process to determine whether
5 an adult claimant is disabled.¹⁴ The claimant has the initial burden of establishing
6 entitlement to disability benefits under steps one through four.¹⁵ At step five,
7 however, the burden shifts to the Commissioner to show that the claimant is not
8 entitled to benefits.¹⁶

9 Step one assesses whether the claimant is currently engaged in a substantial
10 gainful activity.¹⁷ If the claimant is, benefits will be denied.¹⁸ If not, the ALJ proceeds
11 to the second step.¹⁹

12 Step two assesses whether the claimant has a medically severe impairment,
13 or combination of impairments, which significantly limit the claimant’s physical or
14 mental ability to do basic work activities.²⁰ If the claimant does not, the disability
15 claim is denied.²¹ If the claimant does, the evaluation proceeds to the third step.²²

16 Step three compares the claimant’s impairment to several recognized by the
17 Commissioner to be so severe as to preclude substantial gainful activity.²³ If the
18 impairment meets or equals one of the listed impairments, the claimant is
19

20
21 ¹² *Id.* at 1115 (citation omitted).

22 ¹³ *Id.* at 1111 citing (*Shinseki v. Sanders*, 556 U.S. 396, 409 (2009)).

23 ¹⁴ *See* 20 C.F.R. §§ 404.1520, 416.920.

¹⁵ *Parra v. Astrue*, 481 F.3d 742, 746 (9th Cir. 2007).

¹⁶ *Id.*

24 ¹⁷ 20 C.F.R. §§ 404.1520(a)(4)(i), 416.920(a)(4)(i).

¹⁸ 20 C.F.R. §§ 404.1520(b), 416.920(b).

¹⁹ *See id.*

25 ²⁰ 20 C.F.R. §§ 404.1520(a)(4)(ii), 416.920(a)(4)(ii).

26 ²¹ 20 C.F.R. §§ 404.1520(c), 416.920(c).

²² *See id.*

27 ²³ 20 C.F.R. §§ 404.1520(a)(4)(iii), 404.1520(d), 416.920(a)(4)(iii), 416.920(d). *See* 404 Subpt. P App.
1.

1 conclusively presumed to be disabled.²⁴ If the impairment does not, the evaluation
2 proceeds to the fourth step.²⁵

3 Step four assesses whether the impairment prevents the claimant from
4 performing work he or she has performed in the past by determining the claimant's
5 residual functional capacity (RFC).²⁶ If the claimant is able to perform his or her
6 previous work, the claimant is not disabled.²⁷ If the claimant cannot perform this
7 work, the evaluation proceeds to the fifth step.²⁸

8 Step five, the final step, assesses whether the claimant can perform other
9 work in the national economy in light of his or her age, education, and work
10 experience.²⁹ The Commissioner has the burden to show (1) that the claimant can
11 perform other substantial gainful activity, and (2) that a "significant number of jobs
12 exist in the national economy" which the claimant can perform.³⁰ If both of these
13 conditions are met, the disability claim is denied; if not, the claim is granted.³¹

14 **III. Facts, Procedural History, and the ALJ's Findings**

15 Plaintiff is 59 years old and was born in Mexico.³² She attended school through
16 the fifth grade before dropping out to begin working.³³ She speaks some English and
17 can read somewhat in English but has little ability to write in English.³⁴ Her past
18 work is exclusively as a retail cashier.³⁵

21 ²⁴ 20 C.F.R. §§ 404.1520(d), 416.920(d).

22 ²⁵ 20 C.F.R. §§ 404.1520(e), 416.920(e).

23 ²⁶ 20 C.F.R. §§ 404.1520(a)(4)(iv), 416.920(a)(4)(iv).

24 ²⁷ *Id.*

25 ²⁸ *See id.*

26 ²⁹ 20 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v).

27 ³⁰ *Kail v. Heckler*, 722 F.2d 1496, 1497–98 (1984); 20 C.F.R. §§ 404.1520(g), 416.920(g).

28 ³¹ 20 C.F.R. §§ 404.1520(g), 416.920(g).

29 ³² Administrative Record ("AR") 61.

30 ³³ ECF No. 11 at 10.

31 ³⁴ AR 34.

32 ³⁵ AR 62.

1 On February 25, 2015, Plaintiff filed a Title II application for a period of
2 disability and disability insurance benefits.³⁶ Plaintiff alleged disability beginning
3 on February 16, 2015.³⁷ Plaintiff's claims were initially denied and also denied upon
4 reconsideration.³⁸ Plaintiff requested a hearing before an ALJ, which was held on
5 February 1, 2018.³⁹ On February 28, 2018 the ALJ rendered a decision denying
6 Plaintiff's claim.⁴⁰

7 At step one, the ALJ found Plaintiff had not engaged in substantial gainful
8 activity since the alleged onset date.⁴¹

9 At step two, the ALJ found Plaintiff had the following severe impairments:
10 diabetes mellitus, peripheral neuropathy, headaches, cervical and lumbar
11 degenerative disk disease, bilateral sacroiliitis, and obesity.⁴² The ALJ also found
12 that Plaintiff's left shoulder rotator cuff impairment was not severe as defined in the
13 Social Security regulations.⁴³

14 At step three, the ALJ found that Plaintiff did not have an impairment that
15 met the severity of a listed impairment.⁴⁴

16 At step four, the ALJ found that Plaintiff has the RFC to perform light work,
17 as defined in 20 C.F.R. §§ 404.1567(b), with the following limitations.⁴⁵ The ALJ
18 found she can lift/carry up to 10 pounds frequently and up to 20 pounds
19 occasionally.⁴⁶ She can sit about six hours and stand/walk about four hours during a
20
21

22 ³⁶ AR 90.

23 ³⁷ *Id.*

24 ³⁸ AR 116.

25 ³⁹ AR 25–46.

26 ⁴⁰ AR 25–46.

27 ⁴¹ AR 33.

⁴² *Id.*

⁴³ AR 33–34.

⁴⁴ AR 34.

⁴⁵ *Id.*

⁴⁶ *Id.*

1 typical eight-hour workday.⁴⁷ She can frequently push/pull with her left upper
2 extremity and push/pull unlimitedly with her right upper extremity as stated for
3 lift/carry.⁴⁸ She can unlimitedly balance and kneel.⁴⁹ She can occasionally climb
4 ramps/stairs and stoop.⁵⁰ She can frequently crouch.⁵¹ The claimant can never crawl
5 or climb ladders, ropes or scaffolds.⁵² She speaks but cannot read English.⁵³ She
6 should avoid concentrated exposure to fumes, odors, dusts, gasses, poor ventilation,
7 and vibration.⁵⁴ She must avoid all exposure to hazards such as dangerous
8 machinery and unprotected heights.⁵⁵

9 When determining Plaintiff's RFC, the ALJ found that Plaintiff's medically
10 determinable impairments could reasonably be expected to cause some of the alleged
11 symptoms, but that Plaintiff's statements concerning the intensity, persistence and
12 limiting effects of those symptoms were not consistent with the record.⁵⁶ The ALJ
13 also gave some weight to the opinion of Dr. Jack Lebeau, great weight to Dr. James
14 Opara's opinion, and great weight to most of Dr. Gordon Hale's opinion.⁵⁷

15 Finally, the ALJ found that Plaintiff was able to perform past relevant work
16 as a "Cashier II."⁵⁸

17 After the ALJ's decision, Plaintiff submitted to the Appeals Council two new
18 medical reports. The first report was from Kadlec Regional Medical Center dated
19 March 6, 2018.⁵⁹ The second report was from Dr. Robert Whiston, dated March 2,
20

21 ⁴⁷ *Id.*

22 ⁴⁸ *Id.*

23 ⁴⁹ *Id.*

24 ⁵⁰ *Id.*

25 ⁵¹ *Id.*

26 ⁵² *Id.*

27 ⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ AR 35.

⁵⁷ AR 38–39.

⁵⁸ AR 32.

⁵⁹ AR 18–20.

2018.⁶⁰ The Appeals Council concluded that the reports did not “relate to the period at issue” and declined to consider them.⁶¹ The Appeals Council denied Plaintiff’s request for review,⁶² making the ALJ’s decision the final decision for purposes of judicial review.⁶³ Plaintiff filed this lawsuit on August 8, 2018.⁶⁴

IV. Applicable Law & Analysis

The Court remands to the ALJ for consideration of the two medical reports submitted to the Appeals Council by Plaintiff. In light of this conclusion, the Court declines to address Plaintiff’s remaining assignments of error.

A. **The Appeals Council erred in failing to consider the new medical reports.**

The Appeals Council should have considered the medical reports from Kadlec Regional Medical Center and Dr. Robert Whitson but erroneously concluded that the reports did not “relate to the period at issue.” Under agency regulations, the Appeals Council must consider additional evidence that is new, material, and relates to the period on or before the date of the ALJ’s decision.⁶⁵ The Commissioner does not dispute that the reports were new and are material.⁶⁶ The reports also “related to” the time period prior to the ALJ’s decision on February 28, 2018 because the reports discuss the same conditions Plaintiff claimed as the bases of her disability and that

⁶⁰ AR 21–24.

⁶¹ AR 2.

⁶² AR 1–4.

⁶³ 42 U.S.C. § 1383(c)(3); 20 C.F.R. §§ 416.1481, 422.210.

⁶⁴ ECF No. 1.

⁶⁵ See 20 C.F.R. § 404.970(b); *Taylor v. Comm’r of Soc. Sec. Admin.*, 659 F.3d 1228, 1233 (9th Cir. 2011). See also *Lamp v. Astrue*, 531 F.3d 629, 632–33 (8th Cir. 2008) (remanding where it was not clear from the record whether the Appeals Council had considered plaintiff’s additional evidence).

⁶⁶ The reports are material because they bear “directly and substantially on the matter in dispute,” as they describe the conditions that the ALJ found to be severe. *Luna v. Astrue*, 623 F.3d 1032, 1034 (9th Cir. 2010) (quoting *Booz v. Sec’y of Health Human Servs.*, 734 F.2d 1378, 1380 (9th Cir. 1984) (citation omitted)).

1 the ALJ found to be severe impairments.⁶⁷ The reports are dated March 2 and 6,
2 2018—only days after the February 28, 2018 decision. Therefore, the reports must
3 have evaluated Plaintiff's condition on or before February 28, 2018. Otherwise,
4 Plaintiff would have had to developed diabetes, diabetic mellitus, peripheral
5 neuropath, degenerative disc, cervical and lumbar degenerative disc disease, and
6 bilateral sacroiliitis after ALJ's February 28, 2018 decision but before the March 2
7 and 6, 2018 reports. Thus, the reports were new, material, related to the relevant
8 period, and should have been considered by the Appeals Council.⁶⁸

9 The Commissioner argues that the ALJ's decision is still supported by
10 substantial evidence even after considering the additional reports, but the
11 Commissioner's reliance on *Brewes v. Commissioner* to support this argument is
12 misplaced.⁶⁹ In *Brewes*, the Ninth Circuit held:

13 [W]hen the Appeals Council *considers* new evidence in deciding whether
14 to review a decision of the ALJ, that evidence becomes part of the
15 administrative record, which the district court must consider when
reviewing the Commissioner's final decision for substantial evidence.⁷⁰

16 Here, the Appeals Council did not consider the reports at all, making this case
17 directly analogous to *Taylor v. Commissioner*. In *Taylor*, the plaintiff submitted
18 medical reports to the Appeals Council that were dated after the relevant time
19 period, but both documents “related to” the relevant period.⁷¹ The Appeals Council
20 did not consider the evidence, either because it was misplaced or because it
21 erroneously concluded that it pertained to a later time period.⁷² The Ninth Circuit
22

23 ⁶⁷ Compare AR 33 (listing severe impairments) with AR 18–20 (discussing cervical and lumbar
24 degenerative disc disease) and AR 23 (listing diabetes, diabetic neuropath, degenerative disk
25 disease and sacroiliitis as Plaintiff's impairments).

⁶⁸ See 20 C.F.R. § 404.970(b).

⁶⁹ See ECF No. 16 at 4–6.

⁷⁰ *Brewes v. Comm'r of Soc. Sec. Admin.*, 682 F.3d 1157, 1163 (9th Cir. 2012) (emphasis added).

⁷¹ *Taylor*, 659 F.3d at 1233 (citations omitted).

⁷² *Id.* at 1232–33 (noting that the medical reports were not mentioned at all).

1 remanded to the ALJ because the Appeals Council had erroneously failed to consider
2 two new medical reports.⁷³ The facts here are directly analogous because the Appeals
3 Council erroneously did not consider the reports, making remand appropriate.

4 Accordingly, the Court remands the matter to the ALJ for consideration of
5 this evidence.⁷⁴ On remand, the ALJ shall account for the reports in the five-step
6 sequential analysis required under 20 C.F.R. § 404.1520(a)(4)(i)–(v).⁷⁵ Even if the
7 reports are contradicted by other evidence in the record, as a treating physician, Dr.
8 Whitson’s opinion may not be rejected without “specific and legitimate
9 reason . . . supported by substantial evidence in the record.”⁷⁶

10 **B. The Court declines to determine Plaintiff’s remaining assertions of**
11 **error.**

12 As the Court finds that remand is appropriate under *Taylor* for the ALJ to
13 consider how the evidence from the new reports could affect each step of the
14 sequential analysis, the Court need not address Plaintiff’s remaining assignment of
15 error.⁷⁷ The ALJ may wish to reweigh the medical evidence as well as Plaintiff’s
16 subjective testimony in light of the ALJ’s review of the additional reports.

20 ⁷³ *Id.* at 1233.

21 ⁷⁴ District courts have acted in accordance with *Taylor* in similar situations. *See e.g., Crawford v.*
22 *Colvin*, No. ED CV 15-1436-PLA, 2016 WL 1237342, at *7 (C.D. Cal. Mar. 28, 2016) (concluding
23 that remand was necessary where Appeals council erroneously refused to consider medical report
24 that related to the period in question); *Powell v. Colvin*, No. 6:14-cv-01900-SI, 2016 WL 706199,
25 at *5 (D. Or. Feb. 22, 2016) (finding that remand was appropriate under *Taylor* where the Appeals
26 Council failed to consider a psychological evaluation completed after the ALJ’s decision by a
physician who opined that the plaintiff’s mental limitations existed at the present level dating
back to prior to the ALJ’s decision); *Mancillas v. Colvin*, No. 5:13-cv-02522-PSG, 2014 WL
2918897, at *4 (N.D. Cal. June 26, 2014) (finding that Appeals Council erred by refusing to
consider psychiatric evaluation and medical source statement that post-dated ALJ decision but
were based on treatment rendered prior to ALJ decision).

26 ⁷⁵ *Taylor*, 659 F.3d at 1233 (citations omitted).

27 ⁷⁶ *See Lester v. Chater*, 81 F.3d 821, 830–31 (9th Cir. 1996).

⁷⁷ *See Taylor*, 659 F.3d at 1235.

V. CONCLUSION AND ORDER

Based on the foregoing, the ALJ's decision is vacated and the case is remanded to the ALJ for further proceedings consistent with this Order.

Accordingly, **IT IS HEREBY ORDERED:**

1. Plaintiff's Motion for Summary Judgment, **ECF No. 11**, is **GRANTED**.
2. The Commissioner's Motion for Summary Judgment, **ECF No. 16**, is **DENIED**.
3. This matter is **REMANDED** to the Commissioner of Social Security for further proceedings consistent with this decision and sentence four of 42 U.S.C. § 405(g).
4. **The Clerk's Office** shall enter **JUDGMENT** in favor of **Plaintiff**.
5. The file shall be **CLOSED**.

IT IS SO ORDERED. The Clerk's Office is directed to enter this Order and provide copies to all counsel.

DATED this 28th day of June 2019.

s/Edward F. Shea
EDWARD F. SHEA
Senior United States District Judge